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In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ATTORNEY GENERAL, APPELLANT

v.

BOSSIER PARISH SCHOOL BOARD

GEORGE PRICE, ET AL., APPELLANTS

v.

BOSSIER PARISH SCHOOL BOARD

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL APPELLANT

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QUESTION PRESENTED

Whether the district court erred in concluding that, because Bossier Parish School Board's 1992 redistricting plan was not enacted with a retrogressive purpose, it was not enacted with "the purpose * * * of denying or abridging the right to vote on account of race," within the meaning of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

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OPINIONS BELOW

The opinion of the district court (J.S. App. 1a-28a)[1] is reported at 7 F. Supp. 2d 29. An earlier opinion of the district court (J.S. App. 78a-144a) is reported at 907 F. Supp. 434. This Court's opinion on appeal from the district court's initial decision (J.S. App. 29a-77a) is reported at 520 U.S. 471.

JURISDICTION

The judgment of the three-judge district court was entered on May 4, 1998. J.A. 33. Notices of appeal

[1] "J.S. App." refers to the appendix to the jurisdictional statement in No. 98-405.

were filed on July 6, 1998 (the Monday following Friday, July 3, a federal holiday). J.A. 33-34. This Court noted probable jurisdiction on January 22, 1999. J.A. 408. This Court's jurisdiction rests on 42 U.S.C. 1973c.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reproduced in an appendix to this brief (App., *infra*, 1a-2a) are pertinent provisions of the Fourteenth and Fifteenth Amendments to the United States Constitution and Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

STATEMENT

1. The State of Louisiana and all of its political subdivisions are jurisdictions covered by the "preclearance" requirement of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. See 28 C.F.R. Pt. 51 App. Section 5's preclearance requirement provides that a covered jurisdiction may not implement any change in its election practices unless either (1) it has first submitted the proposed change to the Attorney General and the Attorney General has not interposed an objection to the change within 60 days, or (2) it has obtained a declaratory judgment from the United States District Court for the District of Columbia that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c. This case involves the effort by the School Board of Bossier Parish, Louisiana (appellee or Board) to gain preclearance for a redistricting plan that it adopted in 1992.

Bossier Parish is located in northwestern Louisiana. The Parish's primary governing body, the Police Jury, and the Parish's separate School Board each consist of 12 members elected from single-member districts by

majority vote to four-year concurrent terms. J.S. App. 145a. There is no legal requirement that the 12 Police Jury districts and the 12 School Board districts be the same, and the districts for the two bodies were different throughout the 1980s. *Id.* at 150a-151a.

The School Board and the Parish both have a history of racial discrimination beginning before the Civil War and continuing to the present. J.S. App. 210a-220a. That discrimination has affected both the administration of the school system by the Board and the drawing of voting districts for elections to both the Board and the Police Jury.

As for the administration of the school system, *de jure* segregation prevailed in Louisiana's schools long after this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). J.S. App. 216a. In 1965, the Board was placed under a court order to eliminate the vestiges of racial discrimination in its school system. *Lemon* v. *Bossier Parish Sch. Bd.*, 240 F. Supp. 709 (W.D. La. 1965), aff'd, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967). The Board repeatedly sought to evade its desegregation obligations through a variety of devices, and it remains subject to that court order, its 1979 request for termination having been denied. J.S. App. 216a-217a. The Board has continued to violate the *Lemon* court's order to maintain a biracial committee to "recommend to the School Board ways to attain and maintain a unitary system and to improve education in the parish." *Id.* at 182a-183a. The Board also has continued to assign disproportionate numbers of black faculty to schools with predominantly black enrollment. The schools in Bossier Parish have, in fact, become increasingly segregated by race since the 1980s. *Id.* at 217a-218a.

As for the Parish's electoral systems, in 1990, black persons comprised 20.1% of the total population of Bossier Parish, and 17.6% of the voting age population. J.S. App. 145a-146a. The black population of the Parish is heavily concentrated in two areas. More than 50% of the black residents live in Bossier City, and the remaining black population is concentrated in four populated areas in the northern rural part of the Parish. *Id.* at 146a-147a. Voting patterns in the Parish are polarized along racial lines, see *id.* at 201a-206a; see also J.A. 163-174 (analysis by government's expert); one Police Juror estimated that at least 80% of white and black voters choose candidates of their own race, J.S. App. 201a. The parties have also stipulated that it is feasible to draw two reasonably compact majority-black districts in the Parish using traditional districting features such as roads, streams, and railroads. *Id.* at 154a-155a, 192a-194a. Nevertheless, the Police Jury has never enacted a districting plan with any majority-black districts, *id.* at 79a, and black voters have historically been unable to elect candidates of their choice to political positions in the Parish, *id.* at 195a-206a; see J.A. 174 (government's expert concluding that, because of racially polarized voting patterns and bloc voting, "African American voters are likely to have a realistic opportunity to elect candidates of their choice * * * only in districts in which they constitute a majority of the voting age population").[2]

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[2] When the largely stipulated record was compiled in this case, no black person had ever been elected to the School Board. J.S. App. 195a. In the 16 elections in the Parish held from 1981 through 1993 in which a black candidate ran against a white candidate in a single-member district or for mayor, only two black candidates (one for Police Jury, one for Bossier City Council) won. Both of those candidates ran in districts that contained a United States Air Force base that increased the ability of black voters to elect representatives of their choice, in a manner peculiar to those districts. *Id.* at 196a-198a, 199a-200a, 206a; J.A. 168-170, 515-521. When the plans were reconfigured after the 1990 census in a way that reduced the effect of the Air Force Base area, the black incumbent Police Juror was reelected unopposed in 1991 (J.S. App. 198a), and the incumbent black Bossier City Councilmember faced a white challenger in 1993 and lost (*id.* at 200a).

Before its earlier decision in this case, this Court denied the Board's motion to supplement the record with the results of an election that occurred after the district court's 1995 decision. *Reno* v. *Bossier Parish Sch. Bd.*, 517 U.S. 1154 (1996). On remand, the parties agreed to rest on the record that had previously been compiled. J.S. App. 1a. The district court offered the Board two opportunities to reopen the record, which the Board declined. Thus, the district court decided this case on the basis of stipulated facts showing that voting is racially polarized in the Parish, and that no black person had ever been elected to the Board. The Board later asked the district court to take judicial notice of election results after the court's November 1995 judgment, in which blacks were elected to the Board. The district court denied the motion, and explained that, were it "to consider the election results at all, [it] would need more information about them." *Id.* at 1a-2a n.1; see also 98-405 Gov't Opp. to Mot. to Aff. 3-4 n.2.

2. After the 1990 census revealed that its districts were malapportioned, the Police Jury began the process of redistricting. "At the time of the 1990-1991 redistricting process, some Police Jurors were specifically aware that a contiguous black-majority district could be drawn both in northern Bossier Parish and in Bossier City," and "it was obvious that a reasonably compact black-majority district could be drawn within Bossier City." J.S. App. 154a-155a. Nonetheless, during public meetings in April 1991, white Police Jurors and the Police Jury's cartographer, Gary Joiner, told citizens that it was impossible to create such districts because the black population was too dispersed. *Id.* at 160a-162a.

On April 30, 1991, the Police Jury adopted a redistricting plan that, like all of its predecessors, contained no majority-black districts. *Id.* at 163a-164a. The plan required the creation of 20 new precincts and was not the alternative with the fewest precinct splits. *Id.* at 167a-168a.

On May 28, 1991, the Police Jury submitted its redistricting plan to the Department of Justice for preclearance under Section 5. The Police Jury did not provide the Department with information then available to it showing that reasonably compact majority-black districts could be created. Nor did it provide a copy of a letter from the Concerned Citizens of Bossier Parish, a local organization, protesting the Police Jury's exclusion of black citizens from the redistricting process, despite the organization's express request that the letter be included in the Police Jury's Section 5 submission. On July 29, 1991, based on the information submitted to it, the Department of Justice precleared the plan for Police Jury elections. J.S. App. 165a-167a.

3. The School Board initially proceeded without urgency on its own redistricting process, as its next elections were not scheduled to occur until October 1994. J.S. App. 172a. On May 2, 1991 (after the Police Jury had adopted its plan), the Board held a meeting to which the Police Jury's cartographer, Joiner, was invited. Joiner reminded the Board that, because no election was scheduled until 1994, it had "more than adequate time" in which to develop a plan. *Id.* at 173a. The Board engaged Joiner to draft a redistricting plan, which he estimated would take 200 to 250 hours, far longer than would be needed simply to duplicate the Police Jury plan. *Id.* at 125a, 173a. On September 5, 1991, Joiner presented the already-precleared Police Jury plan to the Board, along with precinct maps (because, Joiner explained, the Board would have to work with the Police Jury to alter precinct lines for its own plan). *Id.* at 174a. But despite a proposal by Board Member Tom Myrick (who would have benefitted from the Police Jury Plan because it preserved his district, which was majority-white but contained the largest concentration of black voters under the preexisting plan), the Board did not at that time adopt the Police Jury plan. *Ibid.*

The Board's decision not to adopt the Police Jury plan reflected the fact that the two bodies have different functions and priorities. Police Juries "are concerned with road maintenance, drainage, and in some cases garbage collection, and the level of demand for such services in each district is a concern. School board members, by contrast, are typically concerned with having a public school or schools in each district." J.S. App. 151a. The district lines in the Police Jury plan, however, were not drawn with school locations in mind. *Id.* at 191a. Also, the Police Jury plan did not correspond to the distribution of Board incumbents; if adopted by the Board, the Police Jury plan would have paired Board incumbents against each other in two districts and would have created two other districts with no incumbent. *Id.* at 181a.

Beginning in March 1992, appellant-intervenor George Price, president of the local chapter of the NAACP, wrote to the Board to point out that there was no minority representation on the Board, and requested that he be included in the Board's redistricting process. The Board did not respond to those requests. J.S. App. 175a-176a. In August 1992, Joiner met privately with Board members and showed them various computer-generated alternative scenarios, none of which contained a majority-black district. *Id.* at 176a. Also in

August 1992, at a time when no other plan had been publicly released, Price presented Joiner with a partial plan, containing two majority-black districts, that had been developed by the NAACP. Joiner told Price the Board would not consider a plan that did not include the other ten districts. J.A. 175-176; J.S. App. 177a-178a.

At a Board meeting held on September 3, 1992, Price presented a new NAACP plan that depicted all 12 districts and included two majority-black districts. J.S. App. 177a-178a. The Board refused to consider Price's new plan, ostensibly because "the [NAACP] plan's district lines crossed existing precinct lines, and therefore violated state law." *Id.* at 178a-179a. The Board, its cartographer, and its attorney knew at the time, however, that the Board was not legally precluded from considering a plan that would cross existing precinct lines. *Id.* at 179a. Although state law prohibits school boards themselves from splitting precincts, *id.* at 149a, school boards may and do "request precinct changes from the Police Jury necessary to accomplish their redistricting goals," *id.* at 151a. The Board had long been aware of a possible need to split precincts in fashioning its redistricting plan, for Joiner had explained at the start of the redistricting process that it would have to work with the Police Jury to do so, and had given the Board precinct maps. *Id.* at 174a.

At the next Board meeting on September 17, 1992, only two weeks after Price had presented the NAACP plan, the Board unanimously passed a motion of intent to adopt the Police Jury plan that it had initially found unsatisfactory. J.S. App. 180a. On September 18, 1992, Price and others sent a letter urging the Board to use the NAACP plan as a basis for drawing majority-black districts. J.A. 193-194. The Board's action to adopt the Police Jury plan precipitated overflow citizen attendance at a Board hearing on September 24, 1992, and many citizens, white and black, vocally opposed the plan. Price explained to the Board that, in light of the NAACP plan demonstrating the feasibility of drawing majority-black districts, the Department of Justice's preclearance of the Police Jury plan did not guarantee its preclearance for Board elections. The Board nevertheless adopted the Police Jury plan at its next meeting on October 1, 1992. J.S. App. 180a-181a.

The Board submitted the 1992 plan to the Attorney General for preclearance. On August 30, 1993, the Attorney General interposed an objection to the Board's plan, citing new information that had not been provided when the Police Jury submitted the same plan, such as the demonstrated feasibility of majority-black districts and the Board's refusal to engage in efforts to accommodate the concerns of the black community. J.S. App. 233a-237a.

4. On July 8, 1994, the Board filed a declaratory judgment action in the United States District Court for the District of Columbia, seeking preclearance of its 1992 election plan. The government opposed preclearance, arguing that the Board had not shown an absence of discriminatory purpose on its part, and also that the plan would "result[] in a denial or abridgment of the right * * * to vote on account of race or color," in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. The government did not argue, however, that the 1992 plan had either the purpose or effect of making the position of blacks *worse* than before it was enacted. See J.S. App. 88a, 221a.

On November 2, 1995, a divided three-judge district court granted preclearance. J.S. App. 78a-144a. The court first held that a redistricting plan may not be denied preclearance solely on the basis that the new plan

would violate Section 2. *Id.* at 89a-102a. The court also ruled that the Board, in adopting the Police Jury plan, did not have a racially discriminatory purpose that would bar preclearance. *Id.* at 102a-114a. In reaching that conclusion, the court acknowledged that the Board had "offered several reasons for its adoption of the Police Jury plan that clearly were not real reasons." *Id.* at 106a n.15 (noting that Board had contended that the plan was designed to comply with *Shaw* v. *Reno*, 509 U.S. 630 (1993), which had not yet been decided when the 1992 plan was adopted). The court nonetheless found "legitimate, non-discriminatory motives" for the Board's decision: "The Police Jury plan offered the twin attractions of guaranteed preclearance and easy implementation (because no precinct lines would need redrawing)." J.S. App. 106a.

Judge Kessler concurred in part and dissented in part, and would have denied preclearance. J.S. App. 115a-144a. Although she agreed with the majority that a Section 2 violation does not per se prevent Section 5 preclearance, she dissented from the majority's conclusion that the Board had satisfied its burden to show the absence of a discriminatory purpose in its adoption of the plan. *Id.* at 115a-116a. Taking into account evidence that, she maintained, was relevant to the intent analysis under *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977), she found that "the evidence demonstrates conclusively that [the Board] acted with discriminatory purpose." J.S. App. 117a-118a.

5. The government appealed to this Court, and argued that a voting change may not be precleared under Section 5 if the change would violate Section 2, and that the district court erred in its purpose analysis. This Court disagreed with the government on the first point

and held, in agreement with the district court, that a voting change may not be denied preclearance under Section 5 solely because the change would "result" in a denial or abridgment of the right to vote, in violation of Section 2. J.S. App. 33a-45a. The Court explained that "a plan has an impermissible 'effect' under § 5 only if it 'would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Id.* at 35a (quoting *Beer* v. *United States*, 425 U.S. 130, 141 (1976)).

The Court also held, however, that evidence that a voting change would dilute minority voting strength is relevant to whether that change has a discriminatory *purpose*, and therefore should be denied preclearance. J.S. App. 45a-51a. The Court stated that, even if the only discriminatory purpose that requires denial of preclearance under Section 5 is a retrogressive purpose, *i.e.*, an intent to make the position of minorities worse than before, evidence of vote dilution is relevant to that analysis. *Id.* at 47a. The Court remanded the case to the district court for further consideration as to whether the Board had a discriminatory purpose in adopting the 1992 plan. *Id.* at 50a-51a. In remanding the case, the Court "[left] open for another day the question whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent," and stated that the existence of a "non-retrogressive, but nevertheless discriminatory, purpose," and "its relevance to § 5, are issues to be decided on remand." *Id.* at 45a-46a.[3]

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[3] In separate opinions, Justice Breyer, joined by Justice Ginsburg, and Justice Stevens, joined by Justice Souter, concluded that the purpose inquiry under Section 5 extends beyond the search for retrogressive intent, and "includes the purpose of unconstitu-

6. On remand, the parties rested on the original record. J.S. App. 1a. The government argued that a voting change may not be precleared if it was enacted with a discriminatory (albeit not necessarily retrogressive) purpose, and that the evidence showed that the Board had adopted the 1992 plan with the discriminatory purpose of perpetuating the dilution of blacks' voting strength in Bossier Parish. The district court, again divided, again precleared the Board's plan. *Id.* at 1a-28a.

As to whether Section 5 requires denial of preclearance of a plan enacted with a discriminatory but non-retrogressive purpose, the majority stated, "We are not certain whether or not we have been invited to answer the question the Court left for another day, but we decline to do so in this case." J.S. App. 3a. The majority also remarked that the record in this case "will not support a conclusion that extends beyond the presence or absence of retrogressive intent." *Ibid.* Although the majority remarked that it could "imagine a set of facts that would establish a 'non-retrogressive, but nevertheless discriminatory purpose,'" it stated that "those imagined facts are not present here." *Id.* at 3a-4a. Thus, the majority proceeded to analyze only whether the Board had enacted the plan with an intent to retrogress. It did not examine whether the evidence demonstrated that the Board had enacted the plan with the unconstitutional purpose of maintaining an electoral system that dilutes the votes of blacks in the Parish, nor did it apply the *Arlington Heights* framework to

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tionally diluting minority voting strength." J.S. App. 56a (Breyer, J., concurring in part and concurring in the judgment); *id.* at 76a (Stevens, J., dissenting in part and concurring in part) (agreeing with Justice Breyer on that point).

analyze evidence of such a purpose to dilute blacks' votes.

The district court adhered to its previous view that the Board's adoption of the Police Jury plan was supported by two "legitimate, non-discriminatory motives": the Board's belief that the plan would be easily precleared (because it had already been precleared by the Attorney General for use in Police Jury elections) and its "focus on the fact that the Jury plan would not require precinct splitting, while the NAACP plan would." J.S. App. 5a. Those two motives, the court concluded, were sufficient to establish a "*prima facie* case for preclearance." *Ibid.*

The majority then considered, under the rubric of *Arlington Heights*, *supra*, factors that might be relevant to establish the Board's retrogressive intent. First, it considered whether there was evidence that the plan "bears more heavily on one race than another." J.S. App. 5a. It found that factor inconclusive, because, having limited its analysis to evidence of retrogressive intent, it could not find evidence that "the Jury plan bears more heavily on blacks *than the pre-existing plan*," *ibid.* (emphasis added); even if the 1992 plan was dilutive of black voting strength, it was no *more* dilutive than the previous plan, *id.* at 5a-6a. As for the historical background to the Board's adoption of the 1992 plan, the court acknowledged that there was "powerful support for the proposition that [the Board] in fact resisted adopting a redistricting plan that would have created majority black districts," including the Board's history of resistance to school desegregation (particularly its refusal to obey a district court order to maintain a biracial committee to study ways to attain a unitary school system). *Id.* at 6a-7a. But, the court stressed, all that history proved only "a tenacious de-

termination to maintain the status quo. It is not enough to rebut the School Board's *prima facie* showing that it did not intend retrogression." *Id.* at 7a. Similarly, the sequence of events leading up to the adoption of the plan "does tend to demonstrate the school board's resistance to the NAACP plan," and evidence of the Board's deviation from its normal practices "establishes rather clearly that the board did not welcome improvement in the position of racial minorities with respect to their effective exercise of the electoral franchise," but neither established retrogressive intent. *Ibid.*

Judge Kessler again dissented. J.S. App. 12a-27a. She again concluded that "the School Board's decision to adopt the Police Jury redistricting plan was motivated by discriminatory purpose," *id.* at 12a, and that the Board's "proffered reasons for acceptance of the Police Jury plan are clearly pretextual," *id.* at 15a. She agreed with the government that the existence of a discriminatory, albeit nonretrogressive, purpose requires denial of preclearance under Section 5; otherwise, "we would commit ourselves to granting § 5 preclearance to a 'resistant' jurisdiction's nonretrogressive plan even if the record demonstrated an intent by that jurisdiction to perpetuate an historically discriminatory status quo by diluting minority voting strength." *Id.* at 17a. After reviewing evidence of vote dilution in Bossier Parish, Judge Kessler concluded, "[i]t would be impossible to ignore the weight and the relevance of this § 2 evidence to the School Board's intent to dilute the voting strength of blacks in Bossier Parish." *Id.* at 22a-23a. And she reiterated her previous conclusion, based on applying the *Arlington Heights* framework to the facts of this case, that "the only conclusion that can be drawn from the evidence is that [appellee] acted

with discriminatory purpose." *Id.* at 23a (brackets omitted).

SUMMARY OF ARGUMENT

A. Section 5 of the Voting Rights Act of 1965 prohibits a covered jurisdiction from implementing a new voting practice unless the jurisdiction establishes that the new practice "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c. The "purpose" prong of Section 5 requires the courts to decide whether a voting change has a discriminatory purpose, not merely whether it has a retrogressive purpose. The language of the statute refers simply to a purpose to deny or abridge the right to vote on account of race, and makes no reference to an intent to make the position of minorities worse. The background to Section 5 also makes clear that Congress enacted that provision to prevent covered jurisdictions from implementing voting changes denying and abridging minorities' voting rights in violation of the Constitution, whether or not they are retrogressive. Congress enacted Section 5 because its previous approach to unconstitutional racial discrimination in voting practices, requiring case-by-case litigation to enjoin particular practices, had proven inadequate; Congress found that offending jurisdictions simply replaced one voting practice declared by the courts to be discriminatory with another intended to accomplish the same result. If Section 5 were limited to voting changes with a retrogressive intent, then a jurisdiction could replace one unconstitutionally discriminatory voting practice with another having precisely the same purpose and effect. It is implausible that Congress intended to require either the Attorney General or this Court to give such

approval to unconstitutional, racially discriminatory voting practices.

This Court's previous decisions regarding Section 5 support a construction that precludes enforcement of all voting changes enacted with a racially discriminatory purpose. The Court has explained that, even when a voting change has an effect that does not preclude preclearance, the change should nonetheless be barred if it was enacted with a discriminatory purpose, because official actions taken with a racially discriminatory purpose have no legitimacy under the Constitution. Thus, if a change is enacted with the purpose to dilute the votes of minorities, it should be denied preclearance, even if it is not retrogressive. Although the Court has construed the "effect" prong of Section 5 to be limited to retrogression, that construction reflects concerns about the potential reach of a provision that opens official action to challenge because of discriminatory effects alone, and has little relevance to official action with a racially discriminatory motivation. This construction of Section 5's "purpose" prong is also supported by the Attorney General's longstanding and consistent practice in administering the statute, which is entitled to deference.

B. Appellee's 1992 redistricting plan should be denied preclearance because it had the unconstitutional purpose of diluting the voting strength of black voters in Bossier Parish. Properly analyzed in light of the factors set forth in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the evidence establishes appellee's discriminatory intent. There is both a long and a recent history of racial discrimination against blacks in Bossier Parish, including and especially discrimination by the School Board. The facts leading up to the adoption of the plan

persuasively show invidious intent. The Board originally had little interest in the Police Jury plan because that plan interfered with its traditional districting goals, and intended to adopt an entirely different plan; it turned to the Police Jury plan only after black voters in the Parish began to insist on a plan that would create a majority-black district. The record establishes that the Police Jury plan had the effect of perpetuating the dilution of blacks' voting strength in the Parish. Statements by School Board members also indicate the Board was hostile to black representation on the Board. The district court indeed acknowledged that the Board did not welcome improvement in the political position of blacks in the Parish, and that the Board was motivated to adopt the plan by a "tenacious determination" to maintain the status quo (J.S. App. 7a)—a status quo in which, appellee has conceded, blacks' votes are diluted.

In examining appellee's purpose, the district court erroneously confined its analysis of the evidence under the *Arlington Heights* framework to determining whether the plan had a *retrogressive* purpose. Thus, to the extent the district court may have addressed the plan's discriminatory (but not retrogressive) purpose, its analysis was legally insufficient, for it failed to apply *Arlington Heights* to determine whether the plan had a *discriminatory* purpose. Similarly, any conclusion by the district court that appellee adopted the plan for legitimate reasons could not be sustained on appeal because of the lower court's erroneous truncation of its analysis. The record shows in any event that appellee's justifications for its plan are pretextual. Moreover, because appellee must show the *absence* of a discriminatory purpose to its 1992 plan, preclearance should be denied because the evidence shows that the

plan did have a discriminatory purpose, even if there might also be legitimate justifications for the plan.

ARGUMENT

BECAUSE BOSSIER PARISH SCHOOL BOARD'S 1992 REDISTRICTING PLAN WAS ENACTED WITH AN UNCONSTITUTIONAL, RACIALLY DISCRIMINATORY PURPOSE, THE DISTRICT COURT ERRED IN PRECLEARING THAT PLAN

A. Section 5 Of The Voting Rights Act of 1965 Bars Preclearance Of A Voting Change Enacted With An Unconstitutional, Racially Discriminatory Purpose, Whether Or Not The Change Was Also Intended To Make The Position Of Minorities Worse Than Before The Change Was Enacted

1. Congress Intended Section 5 To Bar Implementation Of Unconstitutional Voting Changes Enacted By Covered Jurisdictions

Section 5 bars the implementation of a covered jurisdiction's voting change unless the jurisdiction establishes that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c. A "purpose * * * of * * * abridging the right to vote on account of race" includes any purpose to limit the voting power of minorities, including the purpose to implement and perpetuate a regime because it dilutes the votes of racial minorities. See *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 569 (1969) (explaining that Section 5 requires preclearance review even when covered jurisdiction does not bar minorities from voting, because "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot"); *Georgia* v. *United States*, 411 U.S. 526, 534 (1973) (Section 5 requires preclearance review of redistricting plans because of potential for dilution of minorities' votes); cf. *Rogers* v. *Lodge*, 458 U.S. 613, 617 (1982) (upholding Fourteenth Amendment intentional vote-dilution challenge to county's at-large election system).

This interpretation is not only consistent with the plain language of the statute, but also it is necessary to effectuate the unambiguous intent of Congress in enacting Section 5 of the statute, in two respects. First, Congress clearly intended in Section 5 to prohibit the implementation of any new practice that violated the Constitution's prohibitions against racial discrimination in voting. Second, Congress enacted Section 5 for the specific purpose of preventing jurisdictions from substituting for one prohibited voting practice another voting practice designed to restore—but not necessarily to magnify—the discriminatory features of the prohibited law. Neither congressional purpose would be served by the construction of Section 5 proposed by appellee (Mot. to Aff. 19), limiting its reach to voting changes enacted with "retrogressive intent"—*i.e.*, with the purpose of making the position of minorities worse than it was before the change.

Congress's overarching purpose in enacting and reenacting Section 5 was to enforce the Constitution's prohibitions against purposeful racial discrimination in voting. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 325-326 (1966); *City of Rome* v. *United States*, 446 U.S. 156, 173-178 (1980); S. Rep. No. 417, 97th Cong., 2d Sess. 9-10 (1982). Indeed, Section 5 tracks the language of the Fifteenth Amendment, which prohibits intentional racial discrimination in official voting practices. Cf. U.S. Const. Amend. XV, § 1 ("The right of citizens * * * to vote shall not be denied or abridged * * * on account of race [or] color[.]"); *Gomillion* v. *Lightfoot*,

364 U.S. 339 (1960). If Section 5's purpose prong were limited to voting changes enacted with a retrogressive intent, then the federal courts (including this Court) and the Attorney General would be required to give approval to changes specifically intended to impair minorities' voting rights in violation of the Constitution, so long as the voting changes were not intended to (and did not) make the position of minorities worse. The background to Section 5 shows that such a construction of Section 5 is implausible.

Congress enacted Section 5 for the specific purpose of stopping the practice of replacing one unconstitutional voting law with another. In the Civil Rights Act of 1957, Congress, to enforce the Fifteenth Amendment, had declared that all citizens otherwise qualified to vote should be entitled to vote "without distinction of race, color, or previous condition of servitude," 42 U.S.C. 1971(a) (1958), and had authorized the Attorney General to bring suit to prevent the deprivation of the right to vote on account of race, 42 U.S.C. 1971(c) (1958). The Justice Department's experience under the 1957 Act was that that statute's approach, requiring affirmative litigation by the federal government, accomplished little (and that only after great delay) because jurisdictions intent on impairing blacks' right to vote resisted voting rights litigation to the utmost. In particular, even after the federal government won final judgments enjoining jurisdictions from enforcing particular discriminatory tests, the jurisdictions simply switched to new devices in order to accomplish the same result. As Attorney General Katzenbach told a subcommittee of the House Judiciary Committee: "[T]he fact is that those who are determined to resist are able, even after apparent defeat in the courts, to devise whole new methods of discrimination. And often

that means beginning the whole weary process all over again."[4]

Congress therefore determined "to shift the advantage of time and inertia from the perpetrators of the

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[4] *Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 5 (1965) (1965 House Hearing); see also *Voting Rights: Hearings on S. 1564 Before the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. Pt. 1, at 11 (1965) (Attorney General Katzenbach, describing "second full-scale attempt to end discriminatory practices" in Selma); H.R. Rep. No. 439, 89th Cong., 1st Sess. 10 (1965) ("Indeed, even after apparent defeat resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods."); S. Rep. No. 162, 89th Cong., 1st Sess. Pt. 3, at 7-9 (1965) (joint views of 12 members of Senate Judiciary Committee, ascribing inadequacy of 1957 Act to "intransigence of local officials and dilatory tactics" used in voting rights litigation); H.R. Rep. No. 397, 91st Cong., 1st Sess. 2 (1969) (because of "State and local intransigence and delays in the judicial process," earlier legislation "yielded insignificant gains"); S. Rep. No. 417, *supra*, at 5 (before 1965, "case-by-case litigation proved wholly inadequate," for "[b]y the time a court enjoined one scheme, the election had often taken place, local officials had devised a new scheme, or both"); *South Carolina*, 383 U.S. at 309-315 (reviewing evidence before Congress about ineffectiveness of litigation under 1957 Act); *Perkins* v. *Matthews*, 400 U.S. 379, 396 & n.13 (1971) (similar); *United States* v. *Mississippi*, 229 F. Supp. 925, 995-997 (S.D. Miss. 1964) (Brown, J., dissenting) (describing Mississippi's response to previous litigation), rev'd, 380 U.S. 128 (1965); *United States* v. *Louisiana*, 225 F. Supp. 353, 392-393 (E.D. La. 1963) (Wisdom, J.) (noting Louisiana had adopted a "good citizenship" test in case its test of understanding state constitution was invalidated), aff'd, 380 U.S. 145 (1965); *United States* v. *Penton*, 212 F. Supp. 193, 201-202 (M.D. Ala. 1962) (Johnson, J.) ("In spite of [two] prior judicial declarations," Alabama "continues in the belief that some contrivance may be successfully adopted and practiced for the purpose of" depriving blacks of franchise); David J. Garrow, *Protest at Selma* 12-29 (1978) (reviewing historical evidence showing ineffectiveness of 1957 Act).

evil to its victims." *South Carolina*, 383 U.S. at 328. It did so by "suspend[ing] new voting regulations [in covered jurisdictions] pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment." *Id.* at 334.[5] Under appellee's view of Section 5, however, if the Justice Department successfully sued to enjoin enforcement of a covered jurisdiction's racially discriminatory voting practice as violative of the Fifteenth Amendment, and the jurisdiction then responded with a different practice that was intended to have, and did have, precisely the same (or a slightly less) invidious effect on blacks' voting rights in violation of the Fifteenth Amendment, then the Attorney General would be required to preclear that new practice.

Nothing in the legislative background to Section 5 suggests that Congress anticipated or desired that the Attorney General preclear newly adopted voting practices that violated the Constitution as long as the new practices were intended merely to hold the line against additional black registration or participation in elections. To the contrary, as the Court explained in *South Carolina*, Section 5 requires "the suspension of all new voting regulations pending review by federal authorities to determine whether their use would *perpetuate* voting discrimination." 383 U.S. at 316 (emphasis added); see *id.* at 335 (Congress intended Section 5 to

[5] See also H.R. Rep. No. 439, *supra*, at 26 (covered jurisdiction must show that new practice "does not have the purpose and will not have the effect of denying or abridging rights guaranteed by the 15th amendment"); S. Rep. No. 162, *supra*, at 24 (same); 1965 House Hearing, *supra*, at 90 (Attorney General Katzenbach, explaining that, under Section 5, voting changes could be precleared quickly "if there was no reason to believe that those laws were in violation of the 15th amendment").

prohibit jurisdictions from "contriving new rules of various kinds for the sole purpose of *perpetuating* voting discrimination") (emphasis added).

Furthermore, when Congress reenacted Section 5 in 1970 and 1982, the relevant committees explained that Section 5 review continued to be necessary to prevent the *perpetuation* and *maintenance* of voting discrimination through adoption of new voting regulations.[6] Indeed, one of Congress's specific concerns when it reenacted Section 5 was that covered jurisdictions that had previously prevented blacks from voting entirely had switched to more subtle methods of abridging minorities' voting rights, such as vote dilution through redistricting plans.[7] Congress retained the preclearance requirement to ensure federal review of cases in which covered jurisdictions abandoned blunt denials of minorities' right to vote in favor of permitting minorities to register and vote but intentionally diluting the value of their vote—a shift that may not be retrogressive but is unquestionably discriminatory and unconstitutional.[8] This shift would have come as no surprise to the Con-

[6] See H.R. Rep. No. 397, *supra*, at 7; S. Rep. No. 417, *supra*, at 14.

[7] See H.R. Rep. No. 397, *supra*, at 7; 116 Cong. Rec. 5521 (1970) (joint statement by members of Senate Judiciary Committee); H.R. Rep. No. 196, 94th Cong., 1st Sess. 10 (1975); S. Rep. No. 295, 94th Cong., 1st Sess. 18 (1975); H.R. Rep. No. 227, 97th Cong., 1st Sess. 6 (1981); S. Rep. No. 417, *supra*, at 6, 7 & n.8, 10-12.

[8] The Court has not definitively resolved whether intentional racial vote dilution violates the Fifteenth Amendment as well as the Fourteenth Amendment. See *Voinovich* v. *Quilter*, 507 U.S. 146, 159 (1993). When Congress reenacted Section 5, it made clear that the Act covers racially motivated voting changes, including intentional vote dilution, that violate the Fourteenth Amendment. See S. Rep. No. 417, *supra*, at 9-10 & n.19.

gress that enacted Section 5, for it knew that jurisdictions covered by the Act had resorted to "extraordinary stratagem[s]" to resist black enfranchisement in the past and had reason to suppose that they would "try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *South Carolina*, 383 U.S. at 335.

Thus, although there has been disagreement over "*how far beyond* the Constitution's requirements Congress intended [Section 5] to reach," neither Congress nor this Court has ever expressed doubt that Section 5's prohibition of discriminatory voting changes was intended "to reach *as far as* the Constitution itself." J.S. App. 57a (Breyer, J., concurring). To hold that the Attorney General and the courts must preclear voting changes enacted with a racially discriminatory (but not retrogressive) purpose would be to conclude that Section 5—the federal government's principal weapon in its arsenal against racial discrimination in voting —cannot reach what Congress understood to be its principal target: the perpetuation of intentional racial discrimination in voting that violates the Constitution.

2. This Court Has Construed Section 5 To Bar Voting Changes With A Discriminatory, But Not Retrogressive, Purpose

a. This Court has consistently held that a voting change enacted with the intent to discriminate against minorities must be denied preclearance under Section 5, whether or not the covered jurisdiction acted with a retrogressive intent. Most recently, in *City of Pleasant Grove* v. *United States*, 479 U.S. 462 (1987), the Court denied preclearance to the annexation, by a city with an all-white population, of two parcels of land, one vacant and one inhabited only by a few white residents. The

Court affirmed the district court's ruling that the City of Pleasant Grove had failed to show that its annexations were untainted by a discriminatory purpose, *id.* at 469, even though it was agreed that the change could not possibly have been retrogressive of the position of black voters in the City at the time of the annexation, since there were no such black voters there, *id.* at 470-471. The Court squarely rejected the contention that "an impermissible purpose under § 5 can relate only to present circumstances," *id.* at 471, and affirmed the denial of preclearance on the basis of the City's "impermissible purpose of minimizing future black voting strength," *id.* at 471-472. "One means of thwarting this process [of black political empowerment]," the Court noted, "is to provide for the growth of a monolithic white voting block, thereby effectively diluting the black vote in advance. This is just as impermissible a purpose as the dilution of present black voting strength." *Id.* at 472. In reaching that conclusion, the Court rejected the argument, advanced in dissent, that, "for a city to have a discriminatory purpose within the meaning of the Voting Rights Act, it must intend its action to have a retrogressive effect on the voting rights of blacks." *Id.* at 474 (Powell, J., dissenting); see *id.* at 471 n.11 (opinion of the Court, rejecting dissent's position).[9]

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[9] Although the dissent in *City of Pleasant Grove* suggested that, "for a city to have a discriminatory purpose within the meaning of the Voting Rights Act, it must intend its action to have a retrogressive effect on the voting rights of blacks," 479 U.S. at 474, the principal point of the dissent was that the annexation of land by an all-white town could not, by definition, have been intended to have *any* effect on black voters, since there were no such black voters. The dissent took issue with what it stated to be the Court's reliance on the possibility that black voters might move

Similarly, in *City of Richmond* v. *United States*, 422 U.S. 358 (1975), the Court ruled that, if an annexation plan was motivated by a discriminatory purpose, it must be denied preclearance, even if the plan does not have a prohibited discriminatory effect on minorities' franchise. Although the Court concluded in that case that the annexation plan at issue did not have a prohibited *effect* on the position of minorities, it made clear the inquiry could not stop at that point, because the district court had found the annexation plan "was

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into the town in the future, suggesting that "such speculation in finding a discriminatory purpose on the part of a state actor is illogical and unprecedented." *Id.* at 476; see *id.* at 476-477 ("Where an annexation's effect on voting rights is purely hypothetical, an inference that the city acted with a motivation related to *voting* rights is unsupportable."). The harm to minority voting rights in this case obviously cannot be considered speculative or hypothetical, since blacks live and vote in Bossier Parish, and the record amply supports a conclusion that the 1992 plan dilutes their votes. See pp. 38-40, *infra*; C.A. No. 94-1495 Appellee Br. 21 (filed Oct. 23, 1997) (conceding on remand that "the [1992] School plan did dilute black voting strength"); J.S. App. 118a-119a (Kessler, J., dissenting) (concluding that the 1992 plan "effectively prevents black voters from electing candidates of their choice to the School Board").

The dissent in *City of Pleasant Grove* also cited *City of Lockhart* v. *United States*, 460 U.S. 125 (1983), for its analysis of the purpose prong of Section 5. In *City of Lockhart*, however, the Court had no occasion to consider the purpose prong of Section 5; because the district court in that case had denied preclearance under Section 5's effect test alone, "it was unnecessary for the District Court to reach the issue of discriminatory purpose." *Id.* at 130 & n.4; see *id.* at 133 (addressing whether city's new charter had "the effect of denying or abridging the right to vote guaranteed by § 5"). Since the Court remanded the case to the district court for further proceedings, *id.* at 136, it evidently anticipated that the district court would address the issue of purpose on remand.

infected by the impermissible purpose of denying the right to vote based on race through perpetuating white majority power to exclude Negroes from office through at-large elections." *Id.* at 373. The Court remanded for further proceedings on the issue of the City of Richmond's intent, and it stressed that, even though the ultimate effect of the annexation might have been permissible, nonetheless "[a]n official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. Section 5 forbids voting changes taken with the purpose of denying the vote on the grounds of race or color." *Id.* at 378; see also *City of Port Arthur* v. *United States*, 459 U.S. 159, 168 (1982) (relying on *City of Richmond* to hold that, even if electoral scheme might reflect political strength of a minority group and therefore pass "effect" test, "the plan would nevertheless be invalid if adopted for racially discriminatory purposes").

This Court's summary affirmance of the district court's denial of preclearance in *Busbee* v. *Smith*, 549 F. Supp. 494, 516 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983), also holds that a voting change must be denied preclearance if it was enacted with a discriminatory purpose, even if that purpose was not necessarily retrogressive. The redistricting plan at issue in *Busbee* was concededly not retrogressive in effect, and in fact it increased black voting strength somewhat. *Id.* at 516. The district court, however, relying upon evidence of Georgia's intent to avoid the creation of a majority-black district in the Atlanta area, denied Section 5 preclearance. *Id.* at 516-518. The court explained that the redistricting plan was "being denied Section 5 preclearance because State officials successfully implemented a

scheme designed to minimize black voting strength to the extent possible, [and] the plan drawing process was not free of racially discriminatory purpose." *Id.* at 518. It therefore denied preclearance squarely on a finding that Georgia had acted with a discriminatory, but not retrogressive, intent.

In its appeal from the district court's judgment, Georgia included the following question in its jurisdictional statement: "Whether a Congressional reapportionment plan that does not have the purpose of diminishing the existing level of black voting strength can be deemed to have the purpose of denying or abridging the right to vote on account of race within the meaning of Section 5 of the Voting Rights Act." J.S. at i, *Busbee* v. *Smith*, 459 U.S. 1166 (1983); see *id.* at 22. In response, the government noted that "[t]he core of [the State's] argument is that the only discriminatory purpose that violates Section 5 is a purpose to * * * cause retrogression," and argued that this reading of Section 5 was foreclosed by *City of Richmond*, *supra*. See Gov't Mot. to Aff. at 4-6, *Busbee* v. *Smith*, *supra*. Thus, this Court's summary affirmance in *Busbee* necessarily rejected the contention that a voting plan enacted with a nonretrogressive, yet discriminatory, purpose may be precleared.

In addition, in *Beer* v. *United States*, 425 U.S. 130, 141 (1976), the Court stated that even an ameliorative election plan can violate Section 5 if it "so discriminates on the basis of race or color as to violate the Constitution"; see also *id.* at 142 n.14 (noting that "[i]t is possible that a legislative reapportionment could be a substantial improvement over its predecessor in terms of lessening racial discrimination, and yet nonetheless continue so to discriminate on the basis of race or color as to be unconstitutional"). Appellee acknowledges that

Beer "suggests that any changes that violate the Constitution also violate Section 5." Mot. to Aff. 24 (internal quotation marks omitted). Congress has reached the same conclusion, for that part of *Beer* was expressly noted with approval in the definitive Senate Report accompanying Congress's 1982 extension of Section 5 without change. See S. Rep. No. 417, *supra*, at 12 n.31; see also *Thornburg* v. *Gingles*, 478 U.S. 30, 43 n.7 (1986) (noting that the Senate Report is the "authoritative source" of the legislative history for the 1982 extension of the Act). Congress's reenactment of Section 5 without changing its applicable standard amounts to a codification of the Court's reading of Section 5 in *Beer*.[10]

b. Appellee has argued (Mot. to Aff. 21) that, because the Court in *Beer* limited the "effect" prong of Section 5 to retrogressive effects, the "purpose" prong must necessarily be limited to an intent to cause retrogression. That argument, however, overlooks both the function played by the effect prong of Section 5 and many of the concerns that animated the Court's construction of it in *Beer*.

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[10] Appellee has acknowledged (Mot. to Aff. 24) that the Senate Report expressly approved the Court's discussion of "purpose" in *Beer*, but it argues that the Court rejected reliance on the same Senate Report on the prior appeal in this case (see J.S. App. 42a). On the prior appeal, the Court concluded that one aspect of the Senate Report was unreliable as an indicator of congressional intent because it was *contrary* to the Court's earlier construction of Section 5 in *Beer*; the Court expressed doubt that, when Congress reenacted Section 5 without change, it would have silently disapproved the Court's decision in *Beer* without amending the statutory language. *Ibid.* The issue on this appeal, however, involves Congress's *approval* of a different part of the Court's decision in *Beer*, which deserves great weight.

As this Court explained in *City of Rome*, Congress in Section 5 prohibited the implementation of voting changes that have a retrogressive effect, even if they do not violate the Constitution itself, because for many years the covered jurisdictions had imposed devices to effect voting discrimination, and had successfully impeded the ability of racial minorities to exercise the electoral franchise effectively. See 446 U.S. at 176. A nonretrogression principle was necessary to ensure that further voting changes did not retard minorities' progress in overcoming that past discrimination. See *id.* at 177-178; see also *South Carolina*, 383 U.S. at 334 (suspension of tests and devices necessary to remedy past discrimination because they could "freeze the effect of past discrimination"); *Lopez* v. *Monterey County*, 119 S. Ct. 693, 703 (1999) (reaffirming that "the Act may guard against both discriminatory animus and the potentially harmful *effect* of neutral laws" in a covered jurisdiction).

The Court has also recognized, however, that allowing a voting practice (or, indeed, any official action) to be subject to challenge solely because it has a discriminatory effect has implications that are potentially very broad. In *Beer*, for example, the Court noted that the district court had applied the concept of "discriminatory effect" to rule, in effect, that blacks were entitled to proportional representation. See 425 U.S. at 136 & n.8. Indeed, in the same Term as *Beer*, the Court decided *Washington* v. *Davis*, 426 U.S. 229 (1976), which held that proof of discriminatory purpose is necessary to establish a violation of the Equal Protection Clause of the Fourteenth Amendment. In rejecting the contention that a discriminatory effect alone is sufficient to establish a constitutional violation, the Court emphasized in *Davis* that such a broad-ranging constitutional

rule "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." *Id.* at 248.

The same concerns, however, are not raised by a construction of Section 5 that prohibits enforcement of voting changes enacted with a purpose to discriminate against minorities. Such a rule does not preclude any voting practice per se; it simply requires that state actors not adopt practices with a discriminatory intent. Cf. *Rogers*, 458 U.S. at 617 (reaffirming that at-large voting systems are not unconstitutional per se, but also holding that they may not be used for the purpose of vote dilution).

The Court has also observed that Section 5—and in particular, its effect prong, which bars enforcement of many voting practices that are not actually unconstitutional—"imposes substantial federalism costs." *Lopez*, 119 S. Ct. at 703 (internal quotation marks omitted). Limiting Section 5's effect prong to cases of retrogression cabins those federalism costs substantially, for a construction of the statute's "discriminatory effect" provision not limited by the principle of retrogression might have substantially interfered with the States' ability to implement election laws that do not offend the Constitution. But there are far fewer federalism costs to a reading of Section 5 that precludes enforcement of voting practices motivated by intentional racial discrimination (even if that motivation is not retrogressive). Such practices violate the Constitution itself, and

therefore may not be legitimately enforced.[11] The principal federalism costs imposed by Section 5 in a case of *intentional* racial discrimination involve the requirement of preclearance and the shifting of the burden of proof to the covered jurisdiction to show that the voting practice does not have a discriminatory purpose. But the Court long ago sustained those aspects of Section 5 as necessary to combat "persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in [such] lawsuits." *South Carolina*, 383 U.S. at 328; see *Lopez*, 119 S. Ct. at 703.

3. The Attorney General's Construction Of Section 5 Is Entitled To Deference

Finally, the Attorney General's construction of Section 5 as prohibiting preclearance of voting changes enacted with an unconstitutional discriminatory purpose (whether or not that purpose is retrogressive) is entitled to deference. The Attorney General has consistently followed that construction. In more than 30 years of enforcement of the Voting Rights Act, the Department of Justice has *always* read Section 5 to require covered jurisdictions to establish that their voting changes were enacted without an unconstitutionally discriminatory purpose, and it has *never* limited its purpose analysis on preclearance review to a search for

[11] See *City of Richmond*, 422 U.S. at 378 (official action "taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution"); *Arlington Heights*, 429 U.S. at 265-266 ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.").

"retrogressive intent."[12] The Attorney General's published procedures for Section 5 submissions do not even recognize the concept of "retrogressive intent," but rather make clear that "the Attorney General will consider whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution." 28 C.F.R. 51.55(a). That longstanding and consistent construction of Section 5 by the Attorney General is entitled to "particular deference" in light of her "central role" in administering Section 5. See *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32, 39 (1978); *Lopez*, 119 S. Ct. at 702.

B. Bossier Parish School Board's 1992 Redistricting Plan Was Enacted With An Unconstitutional, Racially Discriminatory Purpose

1. Proper Analysis Of The Board's Adoption Of The 1992 Plan Under The *Arlington Heights* Framework Shows That The Board Had A Discriminatory Purpose

Appellee has the burden to prove the absence of discriminatory purpose behind the 1992 plan. *City of Rome*, 446 U.S. at 183 n.18. The Court has instructed that, in analyzing "whether invidious discriminatory purpose was a motivating factor" for a voting change, courts should employ the framework of *Arlington Heights*, *supra*. See J.S. App. 48a; cf. *Rogers*, 458 U.S. at 618 (using same framework to evaluate claim of intentional vote dilution). That framework directs the courts to consider, in particular, whether the official ac-

[12] The Attorney General has also consistently taken that position in litigation. See Gov't Mot. to Aff. at 5-6, *Busbee*, *supra*; U.S. Br. at 22-24, *City of Pleasant Grove*, *supra*.

tion "bears more heavily on one race than another"; the "historical background of the [jurisdiction's] decision"; the "specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence" and "substantive departures"; and "[t]he legislative or administrative history," especially "contemporary statements by members of the decisionmaking body." J.S. App. 49a; *Arlington Heights*, 429 U.S. at 266-268. Under that analysis, which was faithfully applied to this case by Judge Kessler (see J.S. App. 23a-26a, 117a-134a), "the only conclusion that can be drawn * * * is that [appellee] acted with discriminatory purpose" (*id.* at 134a).

a. *Historical Background.* There is a well-documented history of racial discrimination affecting blacks in Bossier Parish, including discrimination by the School Board, continuing into the present. As the parties stipulated (J.S. App. 210a-214a), before passage of the Voting Rights Act, Louisiana employed numerous tests and devices to prevent blacks from voting. The Attorney General in 1967 designated Bossier Parish for the appointment of federal voting examiners under Section 6 of the Act, and subsequently denied preclearance to a number of voting changes enacted by the state legislature because of their dilutive effect on black voting rights in the Parish. See *id.* at 214a-216a.[13] In 1991, the Police Jury (which has never drawn a majority-black district) again adopted a districting plan with no majority-black district even though it was "obvious" at the time that at least one reasonably compact majority-black district could have been drawn, and yet members of the Police Jury told the public that no such district could be drawn. *Id.* at 146a-147a, 154a-155a, 161a-162a.[14]

[13] In one case, a district court enjoined the use of multi-member districts in the Bossier Parish area for the state legislature, and referred to the plan as "gerrymandering in its grossest form." J.S. App. 215a.

With respect to the School Board in particular, even after the federal courts ordered the Board to dismantle its segregated school system (which survived *Brown* by over a decade), the Board resisted. The Board disregarded a court order to maintain a biracial committee to recommend ways to attain and maintain a unitary school system. J.S. App. 182a-183a. It also attempted to evade the desegregation order by segregating black children of personnel at the local Air Force Base and implementing an unconstitutional "freedom of choice" plan. The Board has reduced the percentage of the black teachers in the school district by a third (to less than 10% from 14% of the total), and has disproportionately assigned those teachers to schools with mostly black students. Schools in the Parish have also become increasingly segregated by race, despite the Board's affirmative duty to desegregate; in 1993-1994, four of the 16 regular elementary schools had predominantly black enrollment and five had student enrollments that were more than 80% white. *Id.* at 216a-218a.

This Court found a similar history of official discrimination, followed by resistance to improvement in the

[14] The Police Jury plan in fact fragments well-established black communities bordering on the town of Benton and within Bossier City. J.A. 154-156. Further, some of the districts in the Police Jury plan are not compact, J.S. App. 191a; that plan also required the splitting of existing precincts, and was not the plan before the Police Jury with the fewest precinct splits. *Id.* at 167a-168a. The plan also departs from Louisiana law in that it lacks contiguity at one point and its population deviation exceeds plus or minus five percent. J.A. 233-235.

position of minorities, to be highly probative of discriminatory intent in *Rogers*, 458 U.S. at 622-626. In support of its holding, the *Rogers* Court cited such evidence as past voting discrimination, which contributed to low black voter registration, and a racially segregated school system. *Id.* at 625. The Court stressed that historical evidence of discrimination is particularly relevant when "the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo." *Ibid.* That is the case here. Even the district court acknowledged that the Board had shown a "tenacious determination to maintain the status quo." J.S. App. 7a.

b. *Sequence Of Events Leading Up To The Decision.* Especially probative in this case is the sequence of events leading up to the Board's adoption of the Police Jury plan for its own purposes. That course of events convincingly demonstrates that, absent an intent to still black voters' efforts to obtain representation on the Board, appellee would not have adopted the Police Jury plan. When the Board first met with its cartographer (Gary Joiner) in May 1991, no one suggested adopting the plan that the Police Jury had just adopted, which is not surprising, since the Police Jury plan was unsuitable for the Board's priorities in districting–namely school locations and incumbency protection. J.S. App. 151a, 171a, 181a, 191a. At the May 1991 meeting, Joiner estimated that preparing a redistricting plan would take him 200-250 hours, *id.* at 173a, far longer than would be necessary to recycle the Police Jury plan.

When the Board met again with Joiner in September 1991, Joiner provided the Board with precinct maps be-

cause, he explained, the Board would need to work with the Police Jury to alter precinct lines for its own plan (which would have been unnecessary if the Board had intended to adopt the Police Jury plan). J.S. App. 174a. At that meeting, Board Member Myrick—who stood to benefit from the Police Jury plan because his district, which contained the largest concentration of black voters under the preexisting plan, would remain majority-white—suggested adopting that plan. The Board did not take that course. As appellee observed below, Board members "in redistricting fight savagely to keep their pet schools in their new districts," C.A. No. 94-1495 Appellee Br. 6 n.2 (filed Oct. 23, 1997), and "[s]ome of the [Board] members were unhappy with the Police Jury plan because their pet schools were situated outside their new districts," *id.* at 10-11.

Over the following year, Board members met privately with Joiner to discuss various redistricting scenarios. J.S. App. 125a-126a, 176a. Despite requests from the local branch of the NAACP to be included in the redistricting process, the Board gave no notice of such private meetings. *Id.* at 176a. Frustrated at the Board's unresponsiveness, the NAACP developed a plan showing two majority-black districts. *Id.* at 177a. After being told by Joiner that any proposed plan must include all 12 election districts, the NAACP presented such a plan with two majority-black districts on September 3, 1992. J.A. 175-176; J.S. App. 177a-178a.

Only then did the Board become roused to action. On September 17, 1992, "without any further consultation with its cartographer or attempt to address the concerns of the black community, the School Board passed a motion of intent to adopt the Police Jury plan, which had no majority-black districts." J.S. App. 127a. The Board found new favor in the Police Jury plan, even

though it pitted two pairs of Board incumbents against each other and did not allocate schools among the districts to Board members' satisfaction, in direct contradiction of the Board's traditional districting priorities. The Board adopted the Police Jury plan at its next meeting, even after a public hearing attended by an overflow crowd, at which not a single person spoke in favor of the plan. *Ibid.* As Judge Kessler observed, "[t]he fact that the Board adopted a plan which departs substantively from its earlier districting plans and which ignores factors it has usually considered of paramount concern, is probative of discriminatory purpose." *Id.* at 129a. Even the majority agreed that "[e]vidence in the record tending to establish that the board departed from its normal practices * * * establishes rather clearly that the board did not welcome improvement in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at 7a.[15]

c. *Dilutive Impact Of The Plan.* The record compiled in the district court amply establishes that the 1992 plan had a particularly adverse impact on black voters. In fact, appellee conceded on remand that "the

[15] Both this Court and Congress have found such departures to be highly probative of discriminatory intent. See *Arlington Heights*, 429 U.S. at 267 (explaining that departures from substantive considerations are relevant "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," and suggesting that, if in that case, the town had switched zoning classifications only when "[it] learned of [the developer]'s plans to erect integrated housing," that would have presented a "far different case"); S. Rep. No. 417, *supra*, at 10 (explaining that preclearance remedy continued to be necessary because jurisdictions were "depart[ing] from past practice as minority voting strength reaches new levels").

School plan did dilute black voting strength." C.A. No. 94-1495 Appellee Br. 21 (filed Oct. 23, 1997). The record corroborates that concession. Under *Thornburg* v. *Gingles*, *supra*, three factors are particularly relevant to establishing vote dilution: (1) the racial minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the group must be politically cohesive; and (3) the white majority must vote sufficiently as a bloc to usually defeat the minority's preferred candidate. 478 U.S. at 50-51. The record, including the parties' stipulations, established each part of the *Gingles* test. J.S. App. 154a-155a, 192a-194a, 196a-207a.

First, in 1990, black persons comprised 20.1% of the total population of Bossier Parish, and 17.6% of the voting age population. J.S. App. 145a-146a. The black population of the Parish is concentrated in two areas: more than 50% of it lives in Bossier City, and the remaining black residents are concentrated in four identifiable populated areas in the northern rural portion of the Parish. *Id.* at 146a-147a. Contiguous, reasonably compact majority-black districts can be drawn in those areas using traditional redistricting features. *Id.* at 154a-155a, 192a-194a.[16]

Second, the history of elections in the Parish showed both the black community's political cohesion and ra-

[16] The record also shows that Board members were well aware of facts establishing the potentially dilutive impact of the plan. Board members knew where the black population of the Parish lived; some of them explained the increasing racial segregation in the Parish's schools on the ground that predominantly black schools were located in predominantly black neighborhoods. J.A. 94-100, 104, 109-110, 113-124; see also J.S. App. 154a-155a (stipulation that it was "obvious" that majority-black district could have been drawn in Bossier City).

cially polarized voting, resulting in a pattern in which the majority, white voters, prevented the election of the black community's representatives to the Board. The presence of racially polarized voting was recognized in the community and among elected officials. See J.A. 70-71, 130, 132, 134, (testimony by Board Member Jerome Blunt, Police Juror Jerome Darby, Bossier City Councilmember Jeff Darby, and recognition in local press); J.S. App. 201a (Police Juror Burford's estimation that 80% of black and white voters chose candidates of their own race; stipulation that, "[t]o some extent, voting patterns in Bossier Parish are affected by racial preferences"). Before 1992, black candidates had run for the School Board on at least four occasions, but none had been elected. *Id.* at 195a-196a. Further, with few exceptions owing to unusual circumstances, black voters had also been unable to elect candidates of their choice to other political positions in the Parish. *Id.* at 196a-201a. Statistical analysis of elections in which black candidates ran against white candidates disclosed that many were affected by racial bloc voting, *id.* at 202a-207a, and that "African American voters are likely to have a realistic opportunity to elect candidates of their choice * * * only in districts in which they constitute a majority of the voting age population." J.A. 174. Indeed, where black persons comprise 20% of the population, "it is sensible to expect" that at least some black representatives would have been elected to one of the Board's 12 single-member districts before the 1992 redistricting plan was adopted, and "the fact that none [had] ever been elected" is important evidence of purposeful discrimination. *Rogers*, 458 U.S. at 623-624.

d. *Contemporaneous Statements.* Finally, contemporary statements by members of the Board support a finding of discriminatory intent. Member Henry Burns

told one witness who testified at trial that, although he personally favored "having black representation on the board, other school board members oppose[d] the idea." J.S. App. 83a n.4. Member Barry Musgrove told appellant Price that "the Board was 'hostile' toward the idea of a black majority district." *Ibid.* Tom Myrick also told two of the intervenors, after a meeting at which black community representatives had raised concerns about unequal funding for computer purchases at predominantly black schools, that "we [the African Americans] were always trying to take his seat and * * * he was not going to let us take it away from him." J.A. 212; see J.A. 182-183; J.S. App. 83a n.4. "[C]onsidered in the context of the School Board's discriminatory past, * * * th[ose] statements add further proof of improper motive," and "it seems fair to conclude that at least some School Board Members were openly 'hostile' to black representation on the school board." *Id.* at 133a.

In sum, applying *Arlington Heights* to the record permits only one conclusion: when the Board adopted the Police Jury plan as its own redistricting plan, it acted with the unconstitutional, racially discriminatory purpose to deny black voters a fair opportunity to elect candidates of their choice to the School Board.

2. To The Extent The District Court May Have Ruled That The Board Acted Without A Discriminatory Purpose, That Conclusion Cannot Be Sustained

a. Despite the impressive evidence showing that the Board acted with discriminatory intent in adopting its redistricting plan, appellee argues (Mot. to Aff. 15) that the district court actually found that the plan was free even of a discriminatory, but nonretrogressive purpose. That argument is based on two cursory sentences in the

district court's opinion on remand.[17] While the meaning of those sentences is decidedly uncertain, they are best read only as stating that the court would not decide whether appellee acted with a discriminatory intent, not that it decided that appellee had acted without a discriminatory intent. Indeed, just after those sentences, the lower court proceeded to explain that "[t]he question we will answer, accordingly, is whether the record disproves [appellee's] retrogressive intent in adopting the [Police] Jury plan." J.S. App. 4a.

Moreover, to the extent the district court's opinion might be read as concluding that appellee had acted without any discriminatory intent, that conclusion cannot be sustained on appeal. This Court has admonished that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," *Arlington Heights*, 429 U.S. at 266, and has set forth a framework for analyzing evidence of discriminatory intent, *id.* at 266-268; J.S. App. 48a-49a. The district court's comment about the existence *vel non* of a discriminatory purpose, however, was unaccompanied by any discussion of the *Arlington Heights* framework or any analysis of the evidence under it. As Judge Kessler pointed out, the majority discussed the *Arlington Heights* factors "only for the

[17] Specifically: "We are not certain whether or not we have been invited to answer the question the Court left for another day [*i.e.*, whether a discriminatory but nonretrogressive purpose bars preclearance under Section 5], but we decline to do so in this case, because the record will not support a conclusion that extends beyond the presence or absence of retrogressive intent. We can imagine a set of facts that would establish a 'non-retrogressive, but nevertheless discriminatory purpose,' but those imagined facts are not present here." J.S. App. 3a-4a.

purpose of finding evidence of *retrogressive* intent." J.S. App. 24a (emphasis added). Thus, even when the majority did apply the *Arlington Heights* factors, it followed its findings establishing that the Board did not want blacks in the Parish to improve their voting strength with a statement that such evidence did not show intent to *retrogress*. See pp. 12-14, *supra*; J.S. App. 5a-8a. Because the lower court failed to apply the *Arlington Heights* factors to the broader question of discriminatory but nonretrogressive intent, any finding that it may have made on that point is not entitled to deference under the "clearly erroneous" rule of Federal Rule of Civil Procedure 52(a). See *Schneiderman* v. *United States*, 320 U.S. 118, 129-130 (1943) (declining to follow district court's findings because they were "but the most general conclusions of ultimate fact," and it was "impossible to tell from them upon what underlying facts the court relied, and whether proper statutory standards were observed").[18]

Furthermore, any conclusion that appellee's adoption of the plan was free of a discriminatory purpose would be manifestly contrary to the weight of the evidence, as well as the district court's own findings. The court readily acknowledged that appellee was motivated by a "tenacious determination to maintain the status quo."

[18] See also *Sanchez* v. *Colorado*, 97 F.3d 1303, 1316 (10th Cir. 1996) ("Broad and general findings, not explicitly tethered to any particular testimony—especially in the [Voting Rights Act] context which demands penetrating case by case, fact bound analysis—simply do not provide the foundation for proper appellate review."), cert. denied, 520 U.S. 1229 (1997); *Westwego Citizens for Better Gov't* v. *City of Westwego*, 872 F.2d 1201, 1203-1204 (5th Cir. 1989) (district court's findings "manifestly inadequate" because they were "stated in conclusory fashion, with virtually no reference to the evidence presented at trial").

J.S. App. 7a. It also accepted that the record "establishes rather clearly that the board did not welcome improvement in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Ibid.* The lower court's previous decision in this case also recognized that the Board had initially disliked the Police Jury plan for valid reasons, and that it turned to that plan only after the redistricting process "began to cause agitation within the black community." *Id.* at 106a. Thus, while the district court characterized the 1992 plan as a "close port" available in a "storm," *ibid.*, the "storm" was actually the Board's realization that the black community was seeking improvement in its political position, something the Board was determined to oppose.[19] That determination to maintain a status quo that diluted the voting strength and minimized the political effectiveness of blacks in Bossier Parish is a discriminatory purpose in violation of the Constitution. See *Rogers*, 458 U.S. at 617.

b. In rejecting a finding of retrogressive intent, the district court suggested that appellee had advanced two

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[19] Indeed, it is difficult to see how adoption of the Police Jury plan could be justified as helping appellee avoid controversy. To the contrary, the facts show that adoption of that plan only exacerbated controversy. On September 17, 1992, the Board informed the public that it passed a motion of intent to adopt the Police Jury plan. On September 24, 1992, the black community protested the adoption of that plan, and the NAACP presented a petition with signatures of 500 people opposing the plan's adoption. On October 1, 1992, without considering alternative ways to draw a plan with even one majority-black district, the Board nonetheless approved the plan. J.S. App. 179a-181a. The "storm" that the Board was seeking to avoid was not an abstract controversy about redistricting, but rather increasing assertiveness by blacks in Bossier Parish about their voting rights.

"legitimate, non-discriminatory" explanations for choosing the Police Jury plan rather than the NAACP plan—"guaranteed preclearance" by the Attorney General and "easy implementation" (because no precinct lines would need redrawing under the Police Jury plan). J.S. App. 5a, 106a. The court's statement that those justifications were "legitimate" and "non-discriminatory," however, was predicated on its erroneous truncation of its legal analysis to the issue of retrogressive intent, and therefore is not entitled to deference on appeal. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984) ("Rule 52(a) does not inhibit an appellate court's power to correct * * * a finding of fact that is predicated on a misunderstanding of the governing rule of law."). The record clearly demonstrates, moreover, that the proffered justifications were pretextual.

Appellee's hope for "guaranteed preclearance" of the 1992 plan is plainly insufficient, for once an alternative plan with majority-black districts was presented to it, the Board could not reasonably have believed that a plan which ameliorated the existing vote dilution would be *less* likely to receive preclearance than the Police Jury plan. The record also shows that guaranteed preclearance did not in fact induce the Board to adopt the Police Jury plan. Since the plan was precleared for Police Jury elections on July 29, 1991, the Board could have adopted it when it was first proposed on September 5, 1991, or anytime over the next year, yet it continued the process of developing another plan for more than a year. See pp. 6-8, *supra*. On the other hand, the Board had important reasons to enact a different plan, for the Police Jury plan did not protect the incumbencies of four Board members and was not drawn with school locations in mind. See pp. 6-7, *supra*.

Concerns over splitting precincts also did not motivate the Board to adopt the Police Jury plan. There is no evidence that the Board was concerned about preserving precincts before the black community began to request that a majority-black district be drawn. In fact, the Board had anticipated splitting precincts from the beginning of its redistricting process, in order to adopt a plan different from the Police Jury plan that would best serve its legitimate objectives (including preserving the seats of incumbents, a goal that was later sacrificed in the 1992 plan). J.S. App. 174a. The parties also stipulated that school boards may request that the Police Jury realign the Parish's precincts— a process that is both legal and common in Louisiana. *Id.* at 151a. But when the NAACP presented its plan with two majority-black districts, Joiner and the Bossier Parish district attorney asserted (contrary to their knowledge of state law) that the NAACP plan could not be considered because its district lines crossed existing precinct lines, and therefore, would violate state law. *Id.* at 179a.

Finally, even if the district court were correct that the Board's proffered reasons for its adoption of the 1992 plan were not pretextual, the court's decision to preclear the plan would still be erroneous as a matter of law, because the record and the court's own findings make clear that the Board *also* acted with a discriminatory intent in adopting the 1992 plan. A jurisdiction seeking preclearance of a voting change has the burden of proving the *absence* of discriminatory purpose on its part. *City of Pleasant Grove*, 479 U.S. at 469. Because the presence of a discriminatory purpose requires denial of preclearance, a jurisdiction's election plan is not entitled to preclearance if a discriminatory purpose significantly contributed to the adoption of the plan. The

fact that the jurisdiction may have had some legitimate reason for enacting the plan does not permit the court to ignore its discriminatory motivation in doing so. Cf. 42 U.S.C. 2000e-2(m) (Title VII is violated when race "was a motivating factor for any employment practice, even though other factors also motivated the practice").

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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APPENDIX

1. The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> SECTION 1. * * * No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.
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> * * * * *
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

2. The Fifteenth Amendment to the United States Constitution provides:

> SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

3. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides in pertinent part:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, * * * such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory

judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure; *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made.

* * * * *